IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 20TH MARCH 2007 / 29TH PHALGUNA 1928

FAO.No. 15 of 2003()

AS.107/1998 of II ADDL. DISTRICT COURT, PALAKKAD
OS.435/1991 of PRINCIPAL SUB COURT, PALAKKAD
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: APPELLANTS/RESPONDENTS 1 AND 2 /PLAINTIFFS
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1. KAJA HUSSAIN, S/O. NOOR MOHAMMED RAWTHER
AGED 28 YEARS, MANNATHUKAVU, THANNISSERY AMSOM
AND DESOM, PALAKKAD DISTRICT

2. MUHAMMED IBRAHIM,
S/O. NOOR MOHAMMED RAWTHER, AGED 23 YEARS,
MANNATHUKAVU, THANNISSERY, AMSOM AND DESOM,
PALAKKAD DISTRICT.

BY ADV. SRI.S.SANTHOSH
SMT.LISSY DEVASSY
SRI.K.R.HARIN
SMT.A.S.SUVITHA
SRI.MAHADEVAN.K

RESPONDENTS: APPELLANT/AND RESPONDENTS 3 & 4/DEFENDANTS 1,2 & 3
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1. VELAYUDHAN ALIAS C.T.VELUNNI,
AGED 61 YEARS, S/O. THUTHU, MANNATHUKAVIL,
THANNISSERY AMSOM AND DESOM, PALAKKAD TALUK,
PALAKKAD DISTRICT.

2. VELAPPAN S/O. CHAMI, AGED 56 YEARS,
MANNATHUKAVU, THANNISSERY AMSOM AND DESOM,
PALAKKAD TALUK, PALAKKAD DISTRICT.

3. RAJAN S/O. VELAYUDHAN, AGED 46 YEARS,
MANNATHUKAVU, THANNISSERY, AMSOM AND DESOM,
PALAKKAD TALUK, PALAKKAD DISTRICT.

BY ADV. SRI.A.P.CHANDRASEKHARAN (SR.)
SMT.PRABHA R.MENON
SRI.M.KRISHNAKUMAR
SRI.N.SUKUMARAN
SRI.S.SHYAM
SRI.BOBBYMATHEW KOOTHATTUKULAM
SRI.LATHEESH SEBASTIAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 20/03/2007, ALONG WITH FAO NO. 135 OF 2004 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K. PADMANABHAN NAIR, J.

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F.A.O. NO. 15 OF 2003

AND

F.A.O. NO. 135 OF 2004

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Dated this the 15th day of March, 2007

J U D G M E N T

F.A.O. No. 15 of 2003 is filed by plaintiffs 1 and 2 in O.S. No.435 of 1991 on the file of the Sub Court, Palakkad, who were respondents 1 and 2 in A.S. No.107 of 1998 on the file of the District Court, Palakkad. F.A.O. No.135 of 2004 is filed by the first defendant in the aforesaid suit, who was the appellant in A.S. No.107 of 1998. The parties will be referred to as arrayed in the suit.

2. There are two items of properties scheduled to the plaint. First defendant raised a contention that the suit is not maintainable and the plaintiffs have no title over the properties and they have any partible right in the properties. It was also contended that even if they have any right, the same was lost by adverse possession and limitation. He further raised a contention that in case partition is effected and plaintiffs are

allowed to fill up that much of the tank, he will not be able to use the plaint schedule items for his agricultural purposes. The trial court found that the suit for partition is maintainable and the first defendant has not perfected the title by adverse possession and limitation and passed a preliminary decree for partition. Challenging that decree and judgment, first defendant filed A.S. No.107 of 1998. The lower appellate court confirmed the findings of the trial court regarding the partibility of the plaint schedule items and also regarding the contentions raised by the first defendant of adverse possession and limitation. But the lower appellate court held that all the persons interested in the plaint schedule items are not arrayed in the suit and as such the suit is to be remanded for that limited purpose. Challenging that part of the order, plaintiffs have filed F.A.A. No.15 of 2003. The first defendant filed F.A.O. No.134 of 2004 challenging the findings entered into by the lower appellate court. Though no specific substantial question of law is raised in F.A.O. No.15 of 2003, in view of the grounds raised in that appeal memorandum, the substantial question of law arising for consideration is whether

the lower appellate court was justified in remanding the case for impleading additional parties in the absence of a contention raised by the defendants regarding the non-joinder of necessary parties and an issue on that point and a finding by the trial court on such an issue. Substantial question of law raised in the appeal filed by the first defendant is whether the suit for partition of two wells (tanks) is maintainable?

3. Learned counsel for the plaintiffs has strenuously argued before me that the lower appellate court itself had found that none of the defendants has raised a contention that the suit is bad for non-joinder of necessary parties. But the lower appellate court by its own held that the suit is to be remanded for impleading necessary parties. Learned counsel for the first defendant has argued that the plaintiffs claimed partition of two items covered by Exhibit A1. It is contended that Exhibit A1 contains 3 properties. First is the landed property and items 2 and 3 are the right of easement to take water from the tank. It is argued that in view of the provisions contained in Section 6 of the Easement Act, a suit for partition of easement right alone

is not maintainable. Learned counsel for plaintiffs argued that the suit is not for partition of easement right but it is a suit for partition of two tanks. I do not think I will be justified in making any observation in the judgment regarding the same. In view of the stands taken by both parties no additional parties need be impleaded in the suit. I am of the view that the lower appellate court ought to have considered and decided the matter by itself on merits instead of remanding the suit. So the order of remand passed by the lower appellate court has to be set aside.

4. In the result, both the appeals are allowed. The judgment and decree passed by the lower appellate court remanding the suit is set aside. The lower appellate court is directed to rehear A.S.No.107 of 1998 and dispose of the same afresh in accordance with law, after hearing both sides. It is open to the both parties to raise all contentions which they have raised before this Court before the lower appellate court also. The parties shall appear before the lower appellate court on 28.5.2007.

I.A. No.1042 of 2007 in F.A.O. No.135 of 2004 shall stand

closed.

K. PADMANABHAN NAIR, JUDGE.

vsv

K. PADMANABHAN NAIR, J.

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M.F.A. NO. 553 OF 2002

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J U D G M E N T

12TH MARCH, 2007